RESPONSE REQUESTED

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Supreme Court, U.S.
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No. 00-6374

IN THE
SUPREME COURT OF THE UNITED STATES

DALE G. BECKER,

Petitioner,

v.

BETTY MONTGOMERY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a party files a timely – but unsigned – notice of appeal in the district court, and where that party's intent to appeal is clear from the notice and from his later actions in the court of appeals, should the court of appeals retain jurisdiction over the case and reach the merits of the appeal, or at least give the appellant an opportunity to correct the unsigned notice before dismissing the case for lack of jurisdiction?

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INTRODUCTION

Petitioner Becker's civil rights action under 42 U.S.C. 1983 – alleging that he was intentionally exposed to second-hand smoke while incarcerated at a state prison in Ohio – was dismissed by the district court last year, both because Becker had failed to exhaust his prison administrative remedies, and because the complaint failed to state a claim for relief under Fed. R. Civ. P. 12(b)(6). When Becker filed his timely notice of appeal in the district court, he did not sign it. Nearly eight months later – after the case had been fully briefed on the merits of Becker's appeal in the court of appeals – the appellate court dismissed the case because Becker had not signed the notice of appeal.

We agree with Becker that he has indeed identified an issue on which the courts of appeals are divided. And we acknowledge that the approach followed by the Sixth Circuit – treating as a jurisdictional defect any failure by a *pro se* party to sign the notice of appeal – is not compelled by the Federal Rules of Appellate Procedure, at least where, as here, the unsigned notice of appeal was not misleading, and where appellant Becker's intent was clear. We therefore urge the Court to summarily reverse the judgment below, and to remand the case to the court of appeals for further proceedings on the merits of Becker's claims.

A. Court Rules And Decisions Indicate That Notices Of Appeal Should Be Signed, Though Not All Courts Treat The Lack Of A Signature As A Jurisdictional Defect.

"The circuits are divided as to whether the Civil and Appellate Rules require the signing of a notice of appeal." 20 Moore's Federal Practice, § 303.21[3][b][i] (Matthew Bender 3d ed. 2000). Some courts, like the court of appeals below, have insisted that those notices be signed by each *pro se* appellant, and have treated the absence of a signature as a jurisdictional defect. See *Ruiz Rivera v. Riley*, 209 F.3d 24, 27 (1st Cir. 2000) (where notice of appeal was signed by only one of several *pro se* individuals, the notice was valid only as to the individual who had signed the notice); *Covington v. Allsbrook*, 636 F.2d 63, 64 (4th Cir. 1980) (reaching the same result, and explaining that the "only means of determining which litigants are interested in pursuing an appeal is by requiring each *pro se* party to personally sign the notice of appeal"), *cert. denied*, 451 U.S. 914 (1981); *Mikeska v. Collins*, 928 F.2d 126 (5th Cir. 1991) (same result); *Mattingly v. Farmers State Bank*, 153 F.3d 336, 337 (6th Cir. 1998) ("a notice of appeal must be signed in order for it to be considered properly filed"); *Scarrella v. Midwest Federal Sav. and Loan*, 536 F.2d 1207, 1209 (8th Cir. 1976) (where notice of appeal was signed by only one of several *pro se* individuals, the notice was valid only as to the individual who had signed the notice), *cert. denied*, 429 U.S. 885 (1976); *United States v. Johnson*, 43 F.3d 1308, 1310 n.1 (9th Cir. 1995) ("*pro se* appellants must personally sign the notice of appeal").

Other courts have likewise insisted that notices of appeal be signed, but have opted not to treat the lack of a signature as a jurisdictional defect. See, e.g., *McNeil v. Blackburn*, 802 F.2d 830, 832 (5th Cir. 1986) (where the district court returned the appellant's unsigned notice of appeal to him, and a signed version was not received back until after the time for an appeal had run, the court of appeals accepted the timely, but unsigned, notice of appeal); *Robinson v. City of Chicago*, 868 F.2d 959, 962 n.2 (7th Cir. 1989) ("emphasiz[ing] that a notice of appeal must be signed," but declining to treat the lack of a signature as a jurisdictional defect), *cert. denied*, 493 U.S. 1035 (1990); *Lewis v. Lenc-Smith Mfg. Co.*, 784 F.2d 829, 831 (7th Cir. 1986) (noting that a *pro se* appellant "is required to sign the notice of appeal," but giving her or an attorney on her behalf an additional 30 days to sign the notice of appeal); *Price v. United States Navy*, 39 F.3d 1011, 1014-15 (9th Cir. 1994) (where the appellant's husband signed the notice of appeal on her behalf, the court of appeals opted not to dismiss the appeal, given that

the appellee did not claim any confusion, and the error was "immediately corrected"); *Thiem v. Hertz Corp.*, 732 F.2d 1559, 1562 (11th Cir. 1984) (explaining that the "district court clerk would have been better advised to retain the unsigned notice and call for a signed notice to be substituted," but holding that the appeal need not be dismissed for lack of jurisdiction).

The federal circuit courts' near-unanimity on the question of a signature requirement for notices of appeal finds support in the current versions of Fed. R. App. P. 3 and Fed. R. Civ. P. 11, though the first time that any reference to a signature requirement appeared in Rule 3 itself was December 1, 1993, when this language was added to the rule: "A notice of appeal filed *pro se* is filed on behalf of the party signing the notice . . . ." Fed.R.App.P. 3(c) (1993). Five years later, the rule's current language took effect: "A *pro se* notice of appeal is considered filed on behalf of the signer . . . ." Fed. R. App. P. 3(c)(2) (1998).

That language suggests that at least since 1993, a signature requirement has applied to notices of appeal. (And that language in turn suggests that any earlier cases dispensing with a signature requirement have been abrogated by the 1993 and 1998 revisions to the rule.) Rule 11 likewise points to a signature requirement. According to the current version of the rule:

> Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. . . . An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Fed. R. Civ. P. 11 (1993). Similar language has been part of Rule 11 since it was first amended in 1983. And even if Rule 11 applies only to proceedings in the district courts rather than the federal appellate courts, the rule still appears to require a signature on notices of appeal, since those notices must of course be filed with the clerk of the district court, who then forwards them on to the court of appeals. Fed. R. App. P. 3(a)(1).

The sample notice of appeal included in the "Appendix of Forms" in printed versions of the Federal Rules of Appellate Procedure shows a signature line – "(s)_____" – at the bottom of the form, again suggesting that those notices must be signed. See attached App. 1 from Fed. R. App. P. Appendix of Forms, Form 1, 28 U.S.C.A. (2000). That sample form was last modified in 1993. The sample notice of appeal available on the Sixth Circuit's web site contains the same line for a signature. See attached App. 2 from http://pacer.ca6.uscourts.gov/notices/main.php .

B. Where An Identified Party Files A Timely, Though Unsigned, Notice Of Appeal That Clearly Expresses His Intent To Appeal, The Court Of Appeals Should Not Dismiss The Appeal Without First Giving The Appellant An Opportunity To Correct The Notice.

Even if a signature is required on the notice of appeal, however, the more critical question here is whether the absence of a signature allows (or perhaps even requires) a court of appeals to dismiss the appeal for lack of jurisdiction. Certainly the Sixth Circuit treats the lack of a signature on the notice of appeal as a jurisdictional defect, explaining that "[a]n unsigned notice of appeal could be nothing more than opportunistic behavior by the purported appellant in order to gain more time to consider whether or not the party really wants to appeal." *Mattingly v. Farmers State Bank*, 153 F.3d 336, 337 (6th Cir. 1998).

While we appreciate the appellate court's concern in *Mattingly*, and are obviously not disappointed by the application of that case's a-notice-of-appeal-must-be-signed holding to this case, we think the better approach – an approach consistent with the letter and spirit of the federal rules – is the one suggested in the *McNeil*, *Lewis*, *Price* and *Thiem* decisions cited above, from the Fifth, Seventh, Ninth and Eleventh Circuits respectively, all of which declined to dismiss appeals initiated by unsigned notices of appeal, and several of which indicated that additional time should be given to *pro se* appellants to file properly signed notices.

That is particularly true here, where Becker was the only plaintiff in the district court. We cannot honestly claim any uncertainly about petitioner Becker's intention to pursue an appeal once he filed his timely, though unsigned, notice of appeal in the district court. We never objected to the lack of a signature on his notice of appeal, and fully expected the court of appeals to address his appellate arguments on the merits.

The more lenient approach followed by several circuits finds support in the federal rules themselves:

> An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.
>
> ***
>
> An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

Fed. R. App. P. 3(a)(2) & (c)(4).

And the language that we quoted above from Rule 11 suggests that parties should be given an opportunity to add a signature to unsigned documents:

> An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Fed. R. Civ. P. 11(a).

Prior decisions of this Court likewise point to some flexibility in the federal rules when a party's intentions – particularly a *pro se* party's intentions – are clear. See *Smith v. Barry*, 502 U.S. 244, 245 (1992) (holding that "a document intended to serve as an appellate brief may qualify as the notice of appeal required by Rule 3"); *id.* at 248-49 ("If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal."); *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269 (1991) (holding that a district court's non-final bench ruling was a "decision" from which a notice of

appeal could be filed, even if the court had not yet entered final judgment); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-7 (1988) (explaining that "if a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires," but holding that the court of appeals did not have jurisdiction over one particular appellant's appeal where his name had been inadvertently omitted from the notice of appeal filed by his 15 co-appellants); *Foman v. Davis*, 371 U.S. 178, 181 (1962) (holding that because the appellant's "intention . . . was manifest," and because the "defect in the second notice of appeal did not mislead or prejudice the respondent," the court of appeals had improperly dismissed an appeal where the notice of appeal failed to specify all of the orders that the appellant intended to challenge in the appeal).

Here, we think the court of appeals should have directed petitioner Becker to submit a signed notice of appeal if the court – or we, as appellees – had any doubts about his intention to appeal. Even had we had any such doubts, "any doubts as to . . . [his] intent to appeal . . . are resolved by . . . [his] opening brief[]." *New York Life Ins. Co. v. Deshotel*, 142 F.3d 873, 884 (5th Cir. 1998) (holding that a "mistake in designating orders to be appealed does not bar review if the intent to appeal a particular judgment can be fairly inferred and if the appellee is not prejudiced or misled by the mistake"). The court of appeals in this case docketed Becker's appeal on October 1, 1999, and directed him to file an appellant's brief by November 24, 1999. Becker in fact filed such a brief – which he signed both on the cover and on the last page – on November 8, 1999, and no one could then doubt his intention to appeal, or question his willingness to comply with court rules and deadlines.

The May 12, 2000 order from the court of appeals dismissing Becker's appeal because the notice that he filed more than seven months earlier had not been signed seems unnecessarily harsh to us, particularly if the "purpose of requiring [in Rule 11a] unrepresented parties to sign their pleadings . . . was to make certain that those named as parties in an action in which there was no lawyer actually had assented to the filing of the action on their behalf." *Gonzales v. Wyatt*, 157 F.3d 1016, 1021 (5th Cir. 1998) (quoting 5A Wright & Miller, Federal Practice and Procedure: Civil 2d § 1334 at 54-55). There is no doubt on that score in this case, and "it would . . . be a harking back to the formalistic rigorism of an earlier and outmoded time . . . to hold that the extremely simple procedure required by the rules is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with them defeats substantial rights." *Alley v. Dodge Hotel*, 501 F.2d 880, 884 (D.C. Cir. 1974) (quoting *Crump v. Hill*, 104 F.2d 36, 38 (5th Cir. 1939)).

We are not afraid of a ruling on the merits of Becker's claims, and are confident that the district court's judgment dismissing those claims will be affirmed on appeal if the Sixth Circuit addresses them. (One basis on which the district court dismissed Becker's claims – his failure to exhaust administrative remedies available through his prison grievance system before he filed this lawsuit – is at issue in *Booth v. Churner*, No. 99-1964 (petition for cert. granted on 10/30/00), but in any event, the district court properly dismissed Becker's complaint under Fed. R. Civ. P. 12(b)(6).)

Because this Court has not addressed the precise issue in this case, and because the circuit courts have issued conflicting rulings on the question in the petition, the Court of course could grant the petition and set the case for full briefing and argument. We are certainly willing to defend the judgment below in a brief on the merits if the Court so directs. But given

that the federal rules are to "be construed and administered to secure the just, speedy, and inexpensive determination of every action," Fed. R. Civ. P. 1, and given that the question is a straightforward one, a brief opinion from the Court summarily reversing the judgment below seems warranted here.

If an unsigned notice of appeal creates uncertainty for a federal circuit court about the purported appellant or appellants' intent to appeal, then the court of appeals should direct the party or parties who filed the notice to sign or clarify that notice. But where, as here, the court of appeals (and we, as appellees) never questioned the sole appellant's intent to appeal, where that *pro se* appellant filed both the unsigned notice of appeal and later his signed appellate brief well within the time limits set by court rules and orders, and where the court of appeals never gave the appellant an opportunity to correct his notice of appeal as Fed. R. Civ. P. 11(a) seems to contemplate, nothing in the Federal Rules of Appellate Procedure appears to compel the dismissal ordered by the court below.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below summarily reversed, and the case remanded for further proceedings in the court of appeals.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

DAVID M. GORMLEY*
Associate Solicitor
**Counsel of Record*

Counsel for Respondents

November 2000

Form 1 RULES OF APPELLATE PROCEDURE

APPENDIX OF FORMS

Form 1. Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff	)	
	)	
v.	)	*Notice of Appeal*
	)	
C.D., Defendant	)	

Notice is hereby given that [___(here name all parties taking the appeal)___, (plaintiffs) (defendants) in the above named case,[1]] hereby appeal to the United States Court of Appeals for the _____ Circuit (from the final judgment) (from an order (describing it)) entered in this action on the _____ day of _____, 19___.

(s) _____
Attorney for [_____]
[Address:_____]

(As amended Apr. 22, 1993, eff. Dec. 1, 1993.)

[1] See Rule 3(c) for permissible ways of identifying appellants.

United States District Court for the _____
District of _____

_____
_____
_____

Plaintiff,

vs. **CASE NO._____**

_____
_____
_____

Defendant.

NOTICE OF APPEAL

Notice is hereby given that _____, hereby appeal
(here name all parties taking the appeal)

to the United States Court of Appeals for the Sixth Circuit from _____
(the final judgment) (from an

_____ entered in this action on the _____ day of
order (describing it))

_____, _____.

(s)_____

Address:_____

_____

_____

Attorney for _____

cc: Opposing Counsel ___
Court of Appeals ___

6CA-3
1/99

No. 00-6374

IN THE
SUPREME COURT OF THE UNITED STATES

DALE G. BECKER,

Petitioner,

v.

BETTY MONTGOMERY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the enclosed Brief In Response To The Petition For Writ Of Certiorari was served upon Dale G. Becker, #A249-474-00, Chillicothe Correctional Institution, P.O. Box 5500, Chillicothe, Ohio 45601, by first class U.S. mail, postage prepaid, on the 21st day of November, 2000. All persons required to be served have been served.

David M. Gormley
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Columbus, Ohio 43215
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Attorney General
Betty D. Montgomery

November 21, 2000

William K. Suter, Clerk
The Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: No. 00-6374:
Dale G. Becker v. Betty Montgomery

Dear Mr. Suter:

Enclosed please find the original and 10 copies of a Brief In Response To The Petition For Writ of Certiorari in No. 00-6374.

The certificate of service is also enclosed.

Respectfully yours,

David M. Gormley
Associate Solicitor
Office of the Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

cc: Dale G. Becker, Petitioner

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